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Supreme Court of the United States

BOB CAMRETA,
Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,
Respondents.

JAMES ALFORD, Deschutes County Deputy Sheriff,
Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND THE OREGON CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The National Association of Social Workers (NASW) and the Oregon Chapter of NASW respectfully submit this brief as *amici curiae* in support of Petitioners Bob Camreta and James Alford.[1]

The National Association of Social Workers (NASW) is the largest professional membership organization of social workers in the world, comprised of nearly 145,000 social workers, with chapters located in all fifty states, the District of Columbia, the Virgin Islands, Guam, Puerto Rico, and internationally. The Oregon Chapter of NASW has 1,785 members. Since its inception in 1955, NASW has worked to develop and maintain high standards of professional practice, to advance sound social policies, and to strengthen and unify the social work profession. Its activities in furtherance of these goals include promulgating professional standards (including Standards for Social Work Practice in Child Welfare), enforcing the NASW Code of Ethics, conducting research and publishing materials relevant to the profession, and providing continuing education.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than *amici*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief in letters on file with the Clerk's office.

NASW and its Oregon Chapter have a significant interest in this case because many of their members are actively involved in matters involving the safety and protection of children. "[S]ocial workers have been steadfast in their professional and personal commitments to protect children and preserve families. These commitments are demonstrated through their clinical interventions and direct work with children and families, by developing programs and social supports that help prevent child abuse, and by influencing social policies that provide children and families with safety nets and needed services when they find themselves in crisis." Tracy Whitaker, Toby Weismiller & Elizabeth J. Clark, *Assuring the Sufficiency of a Frontline Workforce: A National Study of Licensed Social Workers*, Nat'l Ass'n of Soc. Workers, 8-9 (Mar. 2006), *available at* http://workforce.socialworkers.org/studies/children/children_families.pdf.

NASW's policy statement, *Child Abuse and Neglect*, supports the position that "[c]hild abuse and neglect investigations and substantiations are best conducted using a specially trained, multidisciplinary team, including social workers, law enforcement, and health and mental health professionals." Nat'l Ass'n of Soc. Workers, *Social Work Speaks* 42, 46 (8th ed. 2009). Social workers are also mandated by statute to report suspected incidents of child abuse in all 50 states and the

District of Columbia.[2] Affirmance of the Ninth Circuit decision in this case would adversely impact both the daily work of social workers, and the

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[2] ALA. CODE § 26-14-3(a) (2003); ALASKA STAT. § 47.17.020(a) (2008); ARIZ. REV. STAT. ANN. § 13-3620(A) & (C) (2003); ARK. CODE ANN. § 12-12-507(b)-(c) (2009), CAL. PENAL CODE § 11165.7(a)(15) (2010); COLO. REV. STAT. ANN. § 19-3-304(1), (2), (2.5) (2008); CONN. GEN. STAT. ANN. § 17a-101(b) (2002); DEL. CODE ANN. tit. 16, § 903 (2008); D.C. CODE § 4-1321.02 (2009); FLA. STAT. ANN. § 39.201(1) (2008); GA. CODE ANN. § 19-7-5(c) (2008); HAW. REV. STAT. § 350-1.1 (2010); IDAHO CODE § 16-1605 (1) (2010); 325 ILL. COMP. STAT. ANN. 5/4 (2008); IND. CODE § 31-33-5(1)-(2) (2010); IOWA CODE ANN. § 232.69 (2008); KAN. STAT. ANN. § 38-2223 (2006); KY. REV. STAT. ANN. § 620.030(1)-(2) (2008); LA. CHILD. CODE ANN. art. 603(15) (2008); ME. REV. STAT. ANN. tit. 22, § 4011-A(1) (2008); MD. CODE ANN. FAM. LAW § 5-704(a) (2010); MASS. GEN. LAWS. ANN. ch. 119, § 51A (2007); MICH. COMP. LAWS § 722.633 (2010); MINN. STAT. § 626.556 (2010); MISS. CODE ANN. § 43-21-353 (2007); MO. ANN. STAT. § 210.115(1) (2010); MONT. CODE ANN. § 41-3-201 (2007); NEB. REV. STAT. ANN. § 28-711(1) (2008); NEV. REV. STAT. ANN. § 432B.220 (2008); N.H. REV. STAT. ANN. § 169-C:29 (2009); N.J. STAT. ANN. § 9:6-8.10 (2009); N.M. STAT. ANN. § 32A-4-3(A) (2005); N.Y. SOC. SERV. LAW § 413(1) (2008); N.C. GEN. STAT. § 7B-301 (2005); N.D. CENT. CODE § 50-25.1-03 (2007); OHIO REV. CODE ANN. § 2151.421 (2008); OKLA. STAT. tit. 10A, § 1-2-101 (2009); OR. REV. STAT. § 419B.010 (2009); 23 PA. CONS. STAT. § 6311(a) (2007); R.I. GEN. LAWS § 40-11-3(a) (2008); S.C. CODE ANN. § 63-7-310 (2007); S.D. CODIFIED LAWS § 26-8A-3 (2008); TENN. CODE ANN. § 37-1-403 (2008); TEX. FAM. CODE ANN. § 261.101 (2007); UTAH CODE ANN. § 62A-4a-403 (2008); VT. STAT. ANN. tit. 33, § 4913 (2007); VA. CODE. ANN. § 63.2-1509 (2009); WASH. REV. CODE. ANN. § 26.44.030 (2007); W. VA. CODE § 49-6A-2 (2006); WIS. STAT. § 48.981(2)(a) (2010); WYO. STAT. ANN. § 14-3-205 (2007).

children and families that they have a duty to protect.

SUMMARY OF THE ARGUMENT

Child abuse, including child sexual abuse, continues to pose a widespread and disturbing national problem. According to the most recent statistics available from the U.S. Department of Health and Human Services, an estimated 3.7 million children nationwide were the subject of reports to child welfare authorities in 2008. Of these, approximately 758,000 children were found to have been maltreated, with 9.1 percent – approximately 69,000 children – suffering sexual abuse. U.S. Dept. of Health & Human Servs., Admin. for Children & Families, Admin. on Children, Youth and Families, Children's Bureau, *Child Maltreatment 2008*, 24-26 (2010), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/. During 2009, the Oregon Department of Human Services alone referred 28,584 reports of child abuse or neglect for further investigation, ultimately substantiating over 11,000 individual child victims and 1,270 instances of child sexual abuse, a 15 percent increase in child sexual abuse incidents over 2008. Oregon Dep't of Human Servs., Children, Adults & Families Div., *2009 Child Welfare Data Book* 3, 5, 7 (2010), *available at* http://www.oregon.gov/DHS/abuse/publications/children/2009-cw-data-book.pdf [hereinafter Oregon DHS, *2009 Child Welfare Data Book*].

In view of these distressing statistics, federal and state governments have enacted laws and developed programs to protect children and prevent child abuse. The legislative frameworks in place anticipated that persons and agencies with child protection expertise, including social workers, could bring their specialized knowledge to bear in crafting and carrying out processes to best help child victims and children at risk of abuse. An important part of the child protection scheme involves ensuring that, following a credible report of potential child abuse, the child's safety is promptly assessed in order to swiftly take whatever steps are necessary to protect that child from harm. The assessment process generally requires an interview with the child by a person specially trained to conduct such interviews.

The protective benefits of the assessment process are undermined by the Ninth Circuit's decision to treat assessment interviews of potential child victims as criminal proceedings requiring, in most cases, a showing of probable cause and a warrant or court order. The Ninth Circuit's scheme runs counter to federal and state legislative intent to protect children from harm. It would greatly increase the States' difficulty in protecting children from abuse, particularly sexual abuse, and some children would not be protected. Furthermore, it would impede the development and implementation of best practices for helping children who have been, or may be, abused.

By contrast, the Fourth Amendment reasonableness balancing test applicable to witnesses is the appropriate standard for an interview with a

potential child abuse victim, since the child is a witness and/or victim, not a suspect or perpetrator. Under this standard, assessment interviews of the type conducted by Mr. Camreta and Deputy Sheriff Alford – out of the presence of the child's parents, by a trained interviewer with multiple professionals present, in the safe and neutral setting of the child's school – are reasonable. Such interviews allow children to be promptly protected from any further harm, while minimizing the risk that the investigative process itself will cause additional trauma to a child.

ARGUMENT

I. THE NINTH CIRCUIT'S REQUIREMENT OF PROBABLE CAUSE OR PARENTAL CONSENT DISREGARDS AND UNDERMINES THE PRIMARY PURPOSE OF FEDERAL AND STATE CHILD ABUSE LAWS: PROTECTING CHILDREN

The federal Child Abuse Prevention and Treatment Act ("CAPTA" or "the Act") provides the basis for Oregon's child protective laws and programs implicated in this case. CAPTA mandates particular state practices, including a prompt investigation in response to a report of suspected child abuse, as a condition for states to receive federal grants. The main objective of CAPTA, the state laws it governs, and indeed, any child protection system, is, first and foremost, to keep children safe from harm. *See, e.g.*, Testimony of Caren Kaplan, MSW, Dir. of Child Prot. Reform, Am. Humane Ass'n, Before the U.S. House Comm. on Educ. & Labor's Subcomm. on Healthy

Families & Cmtys., *Preventing Child Abuse and Improving Responses to Families in Crisis*, 1 (Nov. 5, 2009), *available at* http://edlabor.house.gov/documents/111/pdf/testimony/20091105CarenKaplanTestimony.pdf. That objective is not served by the Ninth Circuit's requirement that, in order to interview a child following a report of suspected child sexual abuse, a caseworker and deputy sheriff must normally obtain either parental consent, or a warrant or court order supported by probable cause, and must show probable cause even when acting swiftly in an emergency situation ("exigent circumstances").

The Ninth Circuit standard, which was designed to protect the rights of criminal suspects, not only ignores but also contradicts legislative intent in this setting. Criminal prosecution of suspected perpetrators is not the main objective of CAPTA and the Oregon state law modeled upon it. At most, prosecution is a possible secondary effect to the primary aim of child protection. The probable cause requirement, if allowed to stand, would operate against the main purpose of CAPTA by making it significantly harder for the States to protect children from abuse, particularly sexual abuse. The requirement also hinders the ability of the States to develop guidelines, best practices, and individualized responses geared towards preventing and minimizing harm to children.

A. CAPTA and Oregon's Resulting Laws Support a Protective, Rather than Prosecutorial, Purpose

CAPTA was originally enacted in 1974 in response to nationwide concerns about child abuse. Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101 *et seq.* and §§ 5116 *et seq.*). CAPTA has been amended several times, most recently by the Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 800-831 (2003). The very titles of these laws emphasize preventing child abuse and keeping children safe, and this emphasis is borne out by the statutory language. Section 5106a, entitled "Grants to States for child abuse and neglect prevention and treatment programs," authorizes grants "for purposes of assisting the States in improving the child protective services system of each such State," and specifies numerous improvements relating to assessment of abuse reports, case management, training for workers providing services to children and families, and other protective purposes. It refers repeatedly to the "child protective system" or "child protection system" throughout, and distinguishes it from the "justice system." § 5106a(a)(4), (7), (14); § 5106a(a)(13) (referring to "interagency collaboration between the child protection system and the juvenile justice system"). An entire subchapter of the Act is also devoted to "support[ing] community-based efforts" towards "initiatives aimed at the prevention of child abuse and neglect,"

"reduc[ing] the likelihood of child abuse and neglect," and "foster[ing] an understanding" of diverse populations in order to "be effective in preventing and treating" child abuse and neglect. § 5116(a)(1)-(2), & *et seq.*

By contrast, only one provision of one subsection, 42 U.S.C. § 5106c(a)(3), directly refers to grants for "the investigation and prosecution of cases of child abuse and neglect[.]" This provision is grouped with three other protection-related provisions, concerning grants for handling cases "in a manner which limits additional trauma to the child victim," (§ 5106c(a)(1)), improving handling of cases of child victims with "disabilities or serious health-related problems" (§ 5106c(a)(4)), and improving handling of "suspected child abuse or neglect related fatalities" (§ 5106c(a)(2)). (Although section 5119 addresses reporting of child abuse crime information to a national background check system, it does not discuss actual prosecutions.) Overall, the plain language of the Act does not focus on arresting and punishing suspected perpetrators, but instead shows an overarching purpose of protecting children from harm.

Legislative history also shows that CAPTA and its subsequent amendments were enacted with the intent "to strengthen and support families with children and to protect children from abuse and neglect[.]" S. Rep. No. 108-12, at 2 (2003), *reprinted in* 2003 WL 881123. At the time of the most recent CAPTA amendments in 2003, a Senate committee stated that "[c]hild welfare policy must continue to place a high emphasis on [children's] safety," and

highlighted the need for child protective agencies to thoroughly investigate reports and "respond promptly and effectively" when children are endangered. *Id.* at 2-3.

The House committee considering the 2003 amendments similarly emphasized the preventive aspects of the law. H.R. Rep. No. 108-26, at 25 (2003), *reprinted in* 2003 WL 881120 (discussing, among other things, the "efforts made to prevent child abuse and neglect," the need for States to find "effective methods of prevention," and federal "prevention resources" enabled by the Act). Moreover, although the House committee noted the individual rights of parents being investigated on child abuse allegations, it sought ways to protect those rights "while not compromising the intent of the child protective services system – to ensure that the best interest of the child is the primary focus." *Id.* at 27.

This primary emphasis on protecting children from maltreatment, including child sexual abuse, is well founded considering the significant psychosocial and economic damages to both the child victim and to society, once maltreatment occurs.

> Child abuse and neglect have known detrimental effects on the physical, psychological, cognitive, and behavioral development of children. These consequences . . . include physical injuries, brain damage, chronic low self-esteem, problems with bonding and forming relationships, developmental

> delays, learning disorders, and aggressive behavior. Clinical conditions associated with abuse and neglect include depression, post-traumatic stress disorder, and conduct disorders. Beyond the trauma inflicted on individual children, child maltreatment also has been linked with long-term, negative societal consequences. For example, studies associate child maltreatment with increased risk of low academic achievement, drug use, teen pregnancy, juvenile delinquency, and adult criminality. Further, these consequences cost society by expanding the need for mental health and substance abuse treatment programs, police and court interventions, correctional facilities, and public assistance programs, and by causing losses in productivity. Calculation of the total financial cost of child maltreatment must account for both the direct costs as well as the indirect costs of its long-term consequences.

Nat'l Clearinghouse on Child Abuse & Neglect Info., *Prevention Pays: The Costs of Not Preventing Child Abuse and Neglect*, U.S. Dep't of Health & Human Servs. (2001) (internal citations omitted). Abuse in childhood has also been linked to a higher incidence in adulthood of serious illness and unhealthy behaviors including smoking, substance abuse, attempted suicide, and sexual promiscuity. *See*

generally V.J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. OF PREVENTIVE MED. 245 (1998).

In keeping with the protective and preventive objectives of CAPTA, Oregon has established statutes and detailed administrative rules for handling reports of child abuse, with the primary objective of ensuring children's safety. The state legislature has adopted a policy that "for the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life when consistent with the protection of the child . . . it is necessary and in the public interest to require mandatory reports and investigations of abuse of children and to encourage voluntary reports." OR. REV. STAT. § 419B.007 (2009). Those mandated to report suspected child abuse under the statute include (but are not limited to) doctors, nurses, school employees, child-care providers, and social workers. *Id.* § 419B.010. Incoming reports are screened by the state Department of Human Services to gather necessary information and determine whether each report requires further response. OR. ADMIN. R. 413-015-0205 (2010). In particular, the screener determines whether to refer the case for an assessment by Child Protective Services (CPS). *Id.* at 413-015-0210. CPS states that its purpose is "to identify child safety threats and to assure protection of children after a report of alleged child abuse or

neglect is received by a screener." *Id.* at 413-015-0100 & 0105.

Oregon's rules require a CPS assessment where the screener determines that information received constitutes a report of child abuse or neglect, and any one of several other conditions relevant to the child's safety applies, including the alleged abuser being a legal parent of the child, residing in the child's home, or potentially having access to an unprotected child. *Id.* at 413-015-0210(2). When an assessment is required, the CPS case worker must make an "initial contact" with the child within either 24 hours or five days, depending on factors such as the child's location and whether a delay will compromise the child's safety. *Id.* at 413-015-0210(3). To make an "initial contact," the CPS worker must "have face-to-face contact with and interview the alleged victim, his or her siblings, and other children living in the home. The purpose of the face-to-face contact and interview . . . is to gather information regarding possible child abuse and neglect, assess if the children are vulnerable to identified safety threats, and assess the children's immediate safety." *Id.* at 413-015-0420(1)(a).

In other words, both federal and state laws support the necessity of an assessment interview with a potential child abuse victim, such as occurred in this case, to ensure the child's safety. The assessment interview is not a criminal investigation of the alleged abuser, and should not be subject to a criminal standard.

B. The Ninth Circuit's Requirements, If Allowed to Stand, Would Make It Much Harder For States to Protect Children From Abuse, Particularly Sexual Abuse

Requiring either parental consent, a showing of probable cause with exigent circumstances, or a warrant or court order supported by probable cause, would make it very difficult to protect children from abuse in the manner that Congress and the state of Oregon intended. By contrast, the reasonableness balancing test described by Petitioners allows better protection of children, because the reasonableness of a practice may be evaluated, at least in part, on whether the practice is in the child's best interest. (As discussed in more detail *infra* at Part II of this brief, several characteristics of the interview conducted by Petitioners in this case, including having no parents present at the interview, having a trained caseworker conduct the interview while a professional from another agency observed, and locating the interview at the child's school, are all reasonable, generally accepted best practices which take the child's welfare into account.)

Probable cause presents child abuse investigators with difficulties that can only be avoided by obtaining parental consent before interviewing a child. A showing of probable cause is likely to be required in many, if not most, cases because parents of child victims have strong motivations not to give consent. Indeed, the parent whose consent is sought may be the suspected

perpetrator of the abuse. According to a recent federal government report, 60% of child sexual abuse victims are abused by a parent or the partner of a parent; in more than half of those cases, the abuser is the child's biological parent. A.J. Sedlak et al., *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress*, U.S. Dep't of Health & Human Servs., Admin. for Children & Families, 6-5 (Table 6-2) (2010), *available at* http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl incid/nis4_report_congress_full_pdf_jan2010.pdf. Even non-abusive parents clearly have incentives – such as family loyalty, denial, embarrassment, fear of retaliation, or loss of household income – to avoid an investigation where the suspect is the other parent or another family member.[3] The vast majority of child abuse and neglect perpetrators (over 94% in Oregon in 2009) are related to the child and/or live in the family home, indicating that consent might be withheld in a large number of cases. *See* Oregon DHS, *2009 Child Welfare Data Book*, at 9.

Therefore, under the Ninth Circuit standard, investigators would have to show probable cause in numerous cases of suspected child abuse before they

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[3] For example, it has been estimated that 70% of men who abuse their wives also abuse their children. H.R. Rep. No. 108-26, at 25 (2003), *reprinted in* 2003 WL 881120. An abused mother may thus avoid an investigation into the father's abuse of their child because she fears incurring the father's wrath herself, or because she wishes to hide or deny the fact that she too has been abused.

could interview the children involved. As Petitioners have noted, this creates a circular reasoning problem, particularly in cases of child sexual abuse. This form of abuse generally takes place in secret, and the only two persons present are the child and the abuser. Frequently, the primary account of the abuse can only come from the child. *See, e.g.*, *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663-64 (2008). Furthermore, sexual abuse often leaves no visible or abnormal physical signs on a child, even to a medical examiner's trained eye. Joyce A. Adams, M.D., et al., *Examination Findings in Legally Confirmed Child Sexual Abuse: It's Normal to Be Normal*, 94 PEDIATRICS 310, 315 (1994). Doctors and medical researchers have thus concluded that "the history of the molest provided by the child is probably the most important evidence of sexual abuse." *Id.* at 316. For all these reasons, where child sexual abuse is suspected, it is almost impossible to develop probable cause without interviewing the child. Under this scenario, it is likely that many sexually abused children will not be protected and will suffer further abuse, because investigators will not be able to develop the probable cause necessary to interview them.

Even if investigators could somehow develop the required probable cause, the extra time required to do so weighs against the need to promptly assess the child's safety. Oregon currently requires that initial contact – i.e. an assessment interview with the child – must take place within 24 hours after a screener has confirmed that a report of child abuse has been made. An exception is only made where the

screener can document that the child's safety will not be compromised by responding within five days, and also that "an intentional delay for a planned response" is less likely to compromise the child's safety than an immediate response. OR. ADMIN. R. 413-015-0210(3)(a) (2010). Developing probable cause without an interview, even if it can be done, will probably take longer than 24 hours and perhaps even longer than five days, causing endangered children to remain at risk of harm for longer time periods.

Furthermore, without an assessment interview, investigators would also have difficulty showing "exigent circumstances," i.e. a child in imminent danger of harm, under the Ninth Circuit's jurisprudence. Consequently, most cases would require investigators to first show probable cause and then obtain a warrant or court order based on the showing. Given the sheer number of child abuse reports referred for investigation – over 28,500 in Oregon alone in 2009, as discussed *supra* – the need to obtain a warrant or order in a substantial number of these cases would create significant administrative and judicial burdens. As legislators have observed, many child protection caseworkers are already dealing with large numbers of cases, and are frequently overextended to the point where they have difficulty responding to reports of maltreatment in a timely or adequate manner. H.R. Rep No. 108-26, at 25; S. Rep No. 108-12, at 2. The additional hurdles added by the Ninth Circuit will not help, and may even have the further unwanted effect of driving skilled caseworkers out of the profession by

emphasizing accountability to an adversarial court system over working with children and families. *See* Child Welfare League of Am., et al., *Workforce Recruitment and Retention in Child Welfare: A Review of the Literature* 2-3 (2005) (describing the problem of high turnover among child protective services workers as caused in part by more time spent on documentation requirements, preparing for court appearances and accounting to courts than on working with families).

The risk of abuse in the face of administrative delay not only attaches to the reported child victim, but extends to that child's young siblings and/or other children living in the same home. As previously discussed, the CPS caseworker is also required to have face-to-face contact and an interview with these children to make sure they too are safe. OR. ADMIN. R. 413-015-0210(3). If the interview with the reported child victim is not allowed, then interviews with siblings and other children in the home will be an even more remote possibility. Difficulty in showing probable cause could thus leave not only the child who is the subject of the report, but also several more children from the same home or family, in a dangerous situation, indefinitely. The inevitable result is that more children will suffer harm because the child protection system was unable to act fast enough, or at all, on their behalf.

C. The Ninth Circuit's Requirements Also Hamper States' Abilities to Develop and Implement Best Practices and Guidelines For Protecting Children

The imposition of the Ninth Circuit standard also contravenes the intent of the law by limiting the States' freedom to develop and implement best practices for handling child abuse reports, and individualized responses geared towards each child's situation. CAPTA explicitly encourages States to "enhance[e] the general child protective system by developing, improving, and implementing risk and safety assessment tools and protocols[.]" 42 U.S.C. § 5106a(a)(4). Oregon has developed extensive and detailed administrative procedures for performing child safety assessments. *See, e.g.*, OR. ADMIN. R. 413-015-0415 ("CPS Assessment Activities") & 413-015-0420 ("Make Initial Contact"). The Ninth Circuit decision is highly likely to compel changes to the established assessment protocols of Oregon and other States, regardless of whether those changes comport with known best practices.

The potential exclusion of law enforcement officers from child protective services investigations, in an effort to avoid the appearance of a law enforcement purpose giving rise to a probable cause requirement, is a particular area of concern. As the U.S. Department of Justice has recognized, no single agency has the ability to respond adequately on its own to an allegation of child abuse or to provide necessary services to child victims. U.S. Dep't of

Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Forming a Multidisciplinary Team to Investigate Child Abuse*, 4 (2000), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/170020.pdf [hereinafter USDOJ, *Forming a MDT*]. CAPTA also authorizes grants expressly for the purpose of "creating and improving the use of multidisciplinary teams and interagency protocols to enhance investigations[.]" 42 U.S.C. § 5106a(a)(2)(A). Consequently, the formation of multidisciplinary teams (MDTs), including representatives of both child protective services and law enforcement as well as other agencies such as family services, has become a well-accepted best practice and is often required by state laws. USDOJ, *Forming a MDT*, at 4-6; Lisa M. Jones et al., *Criminal Investigations of Child Abuse: The Research Behind "Best Practices"*, TRAUMA, VIOLENCE & ABUSE, July 2005, at 254-57 (noting the "hundreds" of multidisciplinary teams in use across the country, particularly involving coordination of child protective services with law enforcement).

The team approach allows all disciplines to share their knowledge, skills and abilities and plan strategy together for a more effective and timely response to abuse allegations. Shared information also improves child safety by reducing the risk that a case will somehow "fall through the cracks." Jones at 256. As a result, children are better protected from harm, and the risk of additional trauma to the child victim, caused by the investigation itself, is reduced, in keeping with CAPTA's requirement that child abuse cases, "particularly cases of child sexual abuse

and exploitation," be handled "in a manner which limits additional trauma to the child victim." USDOJ, *Forming a MDT*, at 2, 4; 42 U.S.C. § 5106c(a)(1). Law enforcement collaboration with other agencies can help lessen the trauma caused to the child by an abuse investigation by providing a planned response that reduces the element of surprise to the child and family under investigation. Ctr. for Improvement of Child & Family Servs., Portland State Univ., Sch. of Soc. Work, *Reducing the Trauma of Investigation, Removal, and Initial Out-of-Home Placement in Child Abuse Cases*, 24 (2009), *available at* http://www.ocfs.state.ny.us/main/cfsr/Reducing%20the%20trauma%20of%20investigation%20removal%20%20initial%20out-of-home%20plcaement%20in%20child%20abuse%20cases.pdf [hereinafter *Reducing Trauma*].

However, if allowed to stand, the Ninth Circuit decision will force States to change or even abandon this successful multidisciplinary approach in order to minimize the possibility that a court will find a law enforcement purpose, and thus apply a probable cause requirement, based on the inclusion of law enforcement professionals on the multidisciplinary team. Children will be protected less effectively, and investigative trauma to children will probably increase due to lack of investigative coordination between agencies.

As one example, if law enforcement professionals are not permitted to collaborate with child protective services on an assessment interview of a child victim of abuse, it would be necessary for each agency to conduct its own separate interview of

the child victim. Multiple interviews are not recommended because they increase the trauma to the child, while decreasing the reliability of the information the child provides. This issue is discussed in more detail at paragraph II(B)(2), *infra* (describing why allowing multiple professionals from different agencies to observe an interview conducted by a trained caseworker is reasonable in the context of a child abuse investigation).

Moreover, given the high likelihood of delayed or indefinitely postponed assessment interviews (as discussed *supra* at paragraph I(B)), caseworkers will be forced to make crucial decisions affecting children on incomplete or wrong information. This situation is hardly a good practice, nor is it in the best interest of the child. Instead, it favors the rights of parents and of some suspected perpetrators (especially where the parent is the alleged abuser) over the welfare of children, contrary to legislative intent. *See* H.R. Rep. No. 108-26 at 27 (indicating that the intent of the child protective services system and the primary focus on the child's best interest should not be compromised when seeking to protect parents' individual rights).

D. The Ninth Circuit Decision Should Be Overturned as Contrary to Legislative Intent and Potentially Harmful to Children

Overall, the Ninth Circuit decision requiring probable cause or parental consent before conducting a child safety assessment interview does not comport with the legislative intent to keep children safe and

encourage implementation of child-protective best practices. The standard is not in the child's best interest and is likely to result in more children being abused, in violation of the purposes of CAPTA and applicable Oregon statutes. For all these reasons, it should be overturned.

II. UNDER THE REASONABLENESS BALANCING STANDARD APPROPRIATE FOR WITNESS INTERVIEWS, CHILD INTERVIEWS OF THE TYPE AT ISSUE HERE ARE REASONABLE

In view of the primary goal of child protection, the reasonableness balancing test described by Petitioners is the appropriate standard for evaluating assessment interviews of children who may have been abused. Under that standard, at least three aspects of the interview conducted by Petitioners in this case, including conducting the interview with the child's parents not present, having one trained caseworker conduct the interview with another professional present, and locating the interview at the child's school, support the reasonableness of the interview in this case.

A. The Reasonableness Balancing Standard For Witnesses Properly Focuses Upon Protecting the Child

Obviously, a child whose safety is being assessed via an interview is not a suspect. Rather, the child is a witness and possibly a silent victim, since children rarely report their own abuse. Last year, less than 5.9 percent of Oregon child

maltreatment reports were self-reported by children. Oregon DHS, *2009 Child Welfare Data Book*, at 4. *See also Kennedy*, 128 S. Ct at 2663-64 (discussing how victims of childhood rape tend to keep it secret and only rarely report it to authorities). It is sadly ironic to subject an abused child to a criminal probable cause standard designed to protect suspects, while at the same time maintaining that the child did not cause or bring on the abuse and has committed no wrong. *See, e.g.*, Jill Goldman et al., *A Coordinated Response to Child Abuse and Neglect: A Foundation for Practice*, U.S. Dep't of Health & Human Servs., 32 (2003), *available at* http://www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf ("Children are not responsible for being victims of maltreatment."). The reasonableness standard is not only the proper standard for witnesses in light of the law (as Petitioners have explained), but also shifts the focus from protecting a suspect's rights back to protecting the child, since determining whether an interview is reasonable must take into account the child's best interests and the CAPTA-mandated need to minimize further trauma to the child. 42 U.S.C. § 5106c(a)(1) (requiring "the handling of child abuse and neglect cases, particularly cases of child sexual abuse and exploitation, in a manner which limits additional trauma to the child victim").

B. Child Assessment Interviews Having the Characteristics of the Interview At Issue Are Reasonable

Under the reasonableness balancing test, the circumstances of the assessment interview at issue in this case show that the investigators' actions were both justified and related in scope to the situation. The interview was conducted outside the presence of the child's parents, one of whom was the suspected abuser. A state child protective services investigator conducted the interview, with another professional – a law enforcement officer – present. The location of the interview was not at the child's home, but rather at the child's school. These conditions are reasonable as being best practices that effectively gather information to properly assess the child's safety, while minimizing trauma to the child that might otherwise be caused by an improper investigation.

1. Interviewing a Child Outside the Presence of Her Parent Is Reasonable

The Oregon investigators appropriately chose to interview S.G., whose father was suspected of sexually abusing her, without either of her parents present. It is a well-established best practice to interview children who may have been abused outside the presence of their parents. This practice recognizes the fact that, as discussed *supra* at paragraph I(B), a parent is often the suspected perpetrator of the abuse (as in this case), and that even if not suspected, a parent may still have a detrimental influence on the child's disclosure. *See*,

e.g., Am. Acad. of Child & Adolescent Psychiatry, *Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused*, 36 J. AM. ACAD. CHILD ADOLESCENT PSYCH. J. CHILD. ADOL. PSYCHIATRY 10 Supp. 43S, 48S (Oct. 1997) ("In general, the examination [interview with a child] should take place without the parent present."); Am. Prof'l Soc. on the Abuse of Children, *Practice Guidelines: Investigative Interviewing in Cases of Alleged Child Abuse* 4 (2002) [hereinafter APSAC Guidelines] ("In general, because of possible detrimental influence to the interview process, parents should not be present during the interview.").

2. Having Multiple Professionals Present at a Single Interview of a Child Is Reasonable

Having a single trained caseworker conduct he assessment interview, while one or more professionals from other agencies – in this case, a law enforcement officer – sit in on the interview without asking questions, is also a reasonable investigative practice. This is considered a best practice because the child will not be forced to submit to multiple interviews conducted by different agencies involved with the case, thus reducing the risk that the child will be further traumatized by the investigative process and/or that the child's memories will be affected by repetition or suggestion.

CAPTA contains goals relating to both agency coordination and to minimizing the trauma to children caused by the investigative process.

42 U.S.C. §§ 5106a(a)(2)(A), 5106c(a)(1) (authorizing grants respectively for "creating and improving the use of multidisciplinary teams and interagency protocols to enhance investigations," and for improving the handling of child abuse cases, particularly sexual abuse cases, in "a manner which limits additional trauma to the child victim"). Trauma adversely affects many areas of a child's development and functioning, and children coming into the protective system are often already traumatized from their maltreatment. *Reducing Trauma* at 1. A child abuse investigation carries a high potential for additional trauma, due to the potential conflicts between professionals and the child's family. *Id.* at 1, 10. Therefore, as Congress has mandated, steps should be taken wherever possible to reduce the trauma of investigations. Collaboration and coordination between agencies, including child protective services and law enforcement, helps minimize trauma generally by reducing the element of surprise to the child and family under investigation, and allowing a more measured, planned response. *See id.* at 16, 24.

With respect to assessment interviews in particular, allowing professionals from other agencies to be present at an interview conducted by a trained caseworker reduces trauma to the child by minimizing the number of times the child must tell his or her story and essentially relive the bad experience. This Court, as well as social services and professional associations dealing with child abuse, has recognized the potentially traumatic effects on a child of having to recount his or her sexual abuse

over and over again. *Kennedy*, 128 S. Ct. at 2662-63 (citing G. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims* 50, 62, 72 (1992)). Accordingly, the Justice Department and researchers have recommended that multiple interviews be avoided, and that professionals from different agencies coordinate activities to achieve this outcome. USDOJ, *Forming a MDT*, at 6 (noting that research supports use of a multi-disciplinary investigative team to "reduce the number of investigatory interviews a child must endure" and thus reduce "system intervention trauma"); APSAC Guidelines at 3 (noting that "multiple interviews, especially when conducted by different interviewers, may also be associated with increased child distress"); *Reducing Trauma* at 26 (recommendation to "avoid the need for multiple interviews" and to have law enforcement watch the interview, although from outside the room). This approach appears to have reduced the number of interviews per child in at least some jurisdictions. *See* Jones at 256.

Having a single interview, with other professionals observing, also allows the interview to be conducted by the professional with the best training and knowledge, and allows other agencies to benefit from that person's skill.[4] *See* APSAC

[4] In this case the interviewer was an experienced and trained protective services caseworker. NASW recommends the use of social workers with a bachelor's or master's degree for child welfare positions. "Professional commitment and level of education are the most consistent personal characteristics and

Guidelines at 3 (stating that "it is desirable to appoint the most experienced or most capable professional to be the primary interviewer" while other professionals play a "minimal" role or simply observe); Jones at 257-58 (discussing importance of training for child interviewers, in order to obtain accurate and detailed information without distressing the child). The professionals who are observing but not asking questions have the opportunity to confer with the interviewer, who can then put any question that the other professionals have into the correct form for the child. *See Reducing Trauma* at 26 (advising that law enforcement officer should watch the interview and "may ask that a particular question be asked").

Avoiding multiple interviews also reduces the risk that a child, when questioned multiple times about the same events, will eventually change the story to agree with what the child perceives is the interviewer's desired response. As this Court has noted, children, including victims of abuse, are highly susceptible to suggestive questioning,

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supervisory support and workload/caseload are the most consistent organizational factors identified in the research...." when reviewing the factors positively associated with child welfare staff retention. Joan Levy Zlotnik, Diane DePanfilis, Clara Daining and Melissa McDermott Lane, *Factors Influencing Retention of Child Welfare Staff: A Systematic Review of Research*, Inst. for the Advancement of Soc. Work. Research, in collaboration with Univ. Md. Sch. of Soc. Work Ctr. for Families & Inst. for Human Servs. Policy (2005).

including repetition of questions. *See, e.g.*, *Kennedy*, 128 S. Ct. at 2663; APSAC Guidelines at 3.

For all these reasons, the American Professional Society on the Abuse of Children (APSAC) has indicated that multiple interviews should only be conducted if a child needs a second opportunity to give complete information, or if later findings suggest additional incidents of abuse or additional abusers. APSAC has stated that "[m]ultiple investigative interviews should not be conducted simply because professionals fail to share information with each other." APSAC Guidelines at 3. In view of this need to avoid unnecessary multiple interviews, particularly by different interviewers, the assessment interview conducted by Petitioners was reasonable.

3. Interviewing a Child at School Is Reasonable

The investigators in this case also acted reasonably by interviewing S.G. at her school. As the American Professional Society on the Abuse of Children (APSAC) has noted, choosing the location of a child's interview is important. The interview should take place in an environment that is neutral, private, informal, and free from distractions; the suspected abuser should not be in the vicinity. *See, e.g.*, APSAC Guidelines at 3 (citing a number of other research sources in support). Assuming that the suspected abuser is not a school employee, school fits all these criteria, and APSAC has recognized that "[s]ometimes interviews are conducted at the child's school[.]" *Id.* School has the advantage of being a

familiar, comfortable place to the child, and is often perceived by the child as a safe place. *Cf. Reducing Trauma* at 18 (noting that school may be the one place where an abused child feels safe). School officials can also coordinate with caseworkers to make sure that the child is available for a period of time sufficient to conduct the interview. APSAC Guidelines at 3. This is important because interviewing a child is a sensitive matter that requires additional time beyond the relatively brief "*Terry* stop."

Furthermore, an in-school interview allows social workers to evaluate the child promptly while avoiding the constitutional problems inherent in obtaining access to the family home, particularly where the parent or other responsible adult does not consent to allow investigators into the home. *See generally* Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493, 500-548 (1988) (analyzing constitutional and legal issues surrounding a child abuse investigator's gaining entry to the child's home); H.R. Rep. No. 108-26, at 27 (stating that "the [House] Committee believes that child protective services personnel should understand that they don't have the authority to demand entry into the family home when investigating an allegation."). Aside from the procedural hurdles, interviewing the child at home would also be at odds with the need to conduct the interview outside the parents' presence, because at least one parent normally lives with the child in the home. Interviewing the child at a non-home, non-

school location, such as a child advocacy center, also may create delays while investigators ensure "that they have the legal authority to transport the child to the site." APSAC Guidelines at 2.

Given that young children of school age spend most of their time either at home or at school, and barriers to interviews in the home and elsewhere already exist, creating an additional barrier to interviews at school would drastically reduce the access of caseworkers to children who may have been abused, making it difficult for caseworkers to determine whether children are safe and take protective steps if needed. The relative ease to both caseworker and child of having the interview in the familiar surroundings of the child's school makes that location reasonable, given that time is of the essence in performing the safety assessment, as recognized by Congress, CAPTA and the Oregon child protective services rules.

CONCLUSION

Allowing the Ninth Circuit decision to stand would have serious detrimental consequences on the ability of States to protect children from abuse, particularly sexual abuse, thus frustrating a central purpose of CAPTA and the laws that Oregon and other States built on CAPTA. Best practices, carefully developed through research and experience, would fall by the wayside, and children would suffer further abuse and investigative trauma as a result. For all these reasons, this Court should grant the relief requested by Petitioners.

Respectfully submitted,

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